

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No. 18052 / 2019

In the matter between:

SOUTHERN AFRICA LITIGATION CENTRE

First Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

AUGUSTINUS PETRUS MARIA KOUWENHOVEN

Third Respondent

FILING SHEET

TAKE NOTICE that the Third Respondent files herewith his Answering Affidavit.

Dated at CAPE TOWN on this 16th day of JANUARY 2020.

EISENBERG & ASSOCIATES

Per:


G EISENBERG

Attorneys for the applicants

Suite 904, Touchstone House

7 Bree Street

CAPE TOWN

TO: THE REGISTRAR
WESTERN CAPE HIGH COURT
CAPE TOWN

AND TO: LAWYERS FOR HUMAN RIGHTS

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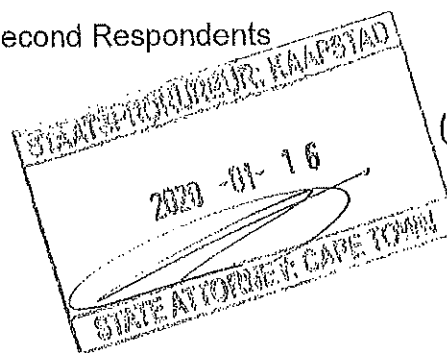
C/O LHR CAPE TOWN LAW CLINIC

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(Ref: SB/WN/slu)

AND TO: THE STATE ATTORNEY

MS S KARJIKER

Attorney for the First and Second Respondents
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CAPE TOWN – 8001
(Ref: 2267/19/P27)



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ANSWERING AFFIDAVIT

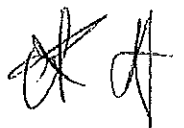
I, the undersigned

AUGUSTINUS PETRUS MARIA (GUUS) KOUWENHOVEN

do hereby make an oath and say that:

1. I am an adult Dutch male, born on 15 September 1942 in 's-Hertogenbosch (also described as Den Bosch), the Netherlands.

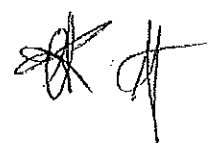
Eisenberg & Associates
Ref: Mr G Eisenberg
021 421 7003



2. I am the third respondent in the above proceedings.
3. This is an answering affidavit in respect of the founding affidavit deposed to by Ms Kaajal Ramjathan-Keogh on 20 September 2019.
4. The contents of this affidavit are, unless otherwise specified, within my personal knowledge. They are, to the best of my knowledge and belief, both true and correct.
5. Where I make submissions of a legal nature, I do so on the advice of my legal representatives.

INTRODUCTION

6. In this application the applicant ("SALC") seeks various orders, the purpose of which is to secure my removal to the Netherlands in order that I may serve a jail sentence. My conviction and sentence has been appealed to the European Court of Human Rights and I am also subject to an ongoing extradition process in South Africa.
7. As I show below, this application is an abuse of process, and the relief sought will undermine the rule of law and frustrate the extradition proceedings.

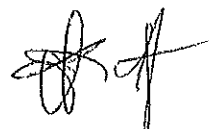


8. I oppose the application on four separate self-standing grounds:

8.1. Firstly, SALC does not have a sufficient interest in the relief sought, and lacks standing to bring the application.

8.2. Secondly, the South African government is presently seeking my extradition. The government's intention is to extradite, and not deport me. Similarly, SALC's prime objective is to have me serve a jail sentence in the Netherlands. SALC seeks to use South Africa's municipal law to extradite me to the Netherlands. The effect of this is to deprive me of my rights under the Extradition Act 67 of 1962. If the relief is granted, I will not be able to invoke such defences as I may have under the Extradition Act. The relief sought constitutes a "disguised extradition" and is, for this reason alone, unlawful.

8.3. Thirdly, and in any event, I am constrained by orders of the Cape Town Magistrates' Court to remain within Cape Town for the duration of the extradition proceedings, and to attend the extradition hearings. Compliance with the relief sought by SALC would contravene these orders.



8.4. Fourthly, if the first and second respondents (collectively referred to as “Home Affairs”) decided to deport me, I would, in the ordinary course, be entitled to certain procedural protection. The effect of the relief sought in this application is to deprive me, not only of my rights under the Extradition Act, but also my rights under the Immigration laws.

9. This affidavit is arranged under the following headings:

9.1. Background

9.1.1. The proceedings in the Netherlands

9.1.2. The extradition proceedings

9.1.3. I am not a fugitive from justice

9.2. Grounds of Opposition

9.2.1. SALC lacks standing

9.2.2. A disguised extradition

9.2.3. The bail orders

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9.2.4. Procedural protection

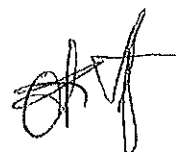
9.3. *Seriatim* response to the founding affidavit

9.4. Conclusion.

BACKGROUND

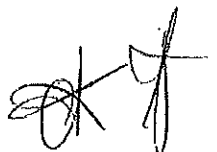
The Proceedings in the Netherlands

10. The proceedings against me ran for a number of years in the Netherlands. I was first arrested in Rotterdam in 2005, partially convicted by a District Court in the Hague in 2006, and then acquitted by the Court of Appeal in the Hague in 2008.
11. The Hague Court of Appeal found that the case against me was based on “quicksand”. This is still the position.
12. The Dutch state appealed against my acquittal to the Supreme Court. The appeal related to the Hague Court of Appeal’s finding that two anonymous witnesses were irrelevant and unreliable. The Advocate-General advised the Supreme Court to uphold my acquittal but, notwithstanding this advice, the Supreme Court directed that I be retried by way of a substantive hearing *de novo* by the Den



Bosch Court of Appeal. The Supreme Court did so for the sole reason that the Hague Court of Appeal had rejected the request by the prosecution to call the two anonymous witnesses.

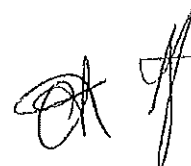
13. When the matter was heard by the Den Bosch Court of Appeal these two anonymous witnesses were not called as they were untraceable.
14. Despite this, the Den Bosch Court of Appeal reversed the finding of the Hague Court of Appeal and on 21 April 2017 convicted me for "*complicity in the co-commission of violation of laws and rules of war*" and other related offences.
15. The proceedings before the Den Bosch Court of Appeal were subject to several further irregularities. For example:
 - 15.1. The Den Bosch Court of Appeal accepted the evidence of prosecution witnesses without permitting examination by me or even hearing the witnesses.
 - 15.2. Furthermore, this Court of Appeal refused to allow me to call defence witnesses.
 - 15.3. This Court of Appeal also improperly limited the questions my counsel could put to those witnesses which were called.



16. For these reasons, *inter alia*, I consider that my fair trial rights were violated by the Den Bosch Court of Appeal.
17. The Netherlands Supreme Court upheld the decision of the Den Bosch Court of Appeal. On 31 May 2019 I lodged an appeal with the European Court of Human Rights, which has been accepted, and this appeal is still pending.
18. I have not exhausted my rights of appeal.

The Extradition Proceedings

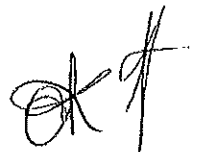
19. At the time of my conviction I was in South Africa residing with my wife and our two minor children. My wife is a permanent resident of South Africa and we are married in community of property.
20. Our children (twins) were born in South Africa on 27 May 2015. They are four years old.
21. In response to the conviction, and in early May 2017, my legal representatives contacted the relevant local authorities, being Adv van Heerden (Principal State Law Adviser, Department of Justice) and W.O. van der Heever (Interpol, SAPS).



22. These authorities undertook, that I would not be arrested on the basis of a provisional request for my extradition, nor would I be arrested without notice.
23. On 4 May 2017, W.O. van der Heever forwarded a first request for my provisional arrest to Adv Van Heerden and the DPP.
24. In accordance with the undertakings, no action was taken by the South African authorities pursuant to this first request for my provisional arrest.
25. On 29 June 2017, Adv van Heerden advised my attorney, Mr Eisenberg, that a provisional request had been received, but assured Mr Eisenberg that it would not be executed until the final request for my extradition had been received.
26. On 7 July 2017, the Department of Justice received a request for extradition from the Department of International Relations and Co-operation (DIRCO). This request was not compliant, and on 13 July 2017 the request was returned to DIRCO.
27. Rather than resolving the difficulties with the final request, the Dutch authorities then chose to submit another request for a provisional arrest. This request was received by the Department of Justice on 21 July 2017. This second provisional request was also non-compliant, and on 26 July 2017 was returned.

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28. A month later, on 22 August 2017, the Department of Justice received an amended request for provisional arrest from DIRCO (which was considered to be compliant), and the Department of Justice forwarded it to Interpol, SAPS on the following day.
29. Notwithstanding the undertakings the authorities decided in August 2017 that they would arrest me pursuant to this provisional request received from the Netherlands, and they also decided not to give me notice of such an arrest.
30. Documents disclosed by the South African authorities reveal that: by 24 August 2017, Adv Burke of the DPP's office was preparing for a bail application which he thought would take place soon; by 5 September 2017, Interpol, SAPS was surveying me; and by 5 October 2017, the application for a warrant of arrest had been compiled.
31. Some months later, on 6 December 2017, W.O. van der Heever applied *ex parte* to a magistrate in Pretoria ("the Pretoria Magistrate") for a warrant of arrest in terms of s 5(1)(b) of the Extradition Act. W.O. van der Heever did not disclose that undertakings had been given to me. Furthermore, the application was supported by an affidavit which had been commissioned by a junior colleague of W.O. van der Heever at Interpol, SAPS, namely Sgt von Hagen.



32. The Pretoria Magistrate rubber-stamped the application and granted the warrant sought by W.O. van der Heever ("the warrant"). To compound the irregularities, the Pretoria Magistrate then failed to furnish the Minister of Justice with particulars relating to the issue of the warrant, as required by s 8(1) of the Extradition Act.
33. I was then arrested on 8 December 2017, without any warning, and by no less than twelve police officers.
34. On the same day I immediately brought a bail application. The DPP asked for time to prepare an opposing affidavit, and the bail application was then argued between 12-14 December 2017.
35. On 19 December 2017, after spending 11 days in police cells, I was granted bail. The conditions of my bail are set out in more detail below.
36. While I was in jail, on 18 December 2017, the Department of Justice (unbeknown to me) received a revised final request for extradition, and this was sent to Adv van Heerden. (Neither me, nor my representatives, were provided with a copy of this final request until 20 April 2018.)
37. On 31 January 2018 I launched an application in which I asserted that my constitutional rights had been violated, and I sought orders declaring that I had

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been brought unlawfully before the Cape Town Magistrate, that the warrant and my arrest were unlawful, and directing that the warrant be set aside, together with ancillary relief (“the habeas corpus application”).

38. On 22 February 2018 the Justice Minister issued a notification in terms of s 5(1)(a) of the Act.

39. At all times I satisfied the time periods contained in the Rules of Court, and I sought to prosecute the habeas corpus application with due expedition.

40. On 29 March 2019 SALC’s attorneys addressed a letter to the parties in the habeas corpus application in which they requested consent for SALC’s admission as an *amicus* in that application. A copy of this letter is annexed and marked “APMK1”.

41. This request was defective in several respects. For instance:

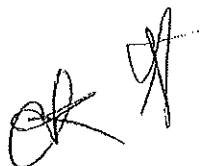
41.1. SALC did not identify any constitutional issue which it wished to address;

41.2. SALC did not state what position it intended adopting in the proceedings, nor what submissions it intended making (although it was plain that SALC sought to ensure my extradition);

- 41.3. SALC did not show how its submissions would be different to those of the parties and how they would assist the court; and
- 41.4. The request erroneously referred to proceedings in the “Equality Court”.
42. It appeared that SALC had chosen to intervene as an *amicus* without proper consideration of what the habeas corpus application concerned, what evidence had been led and what the government respondents intended to argue. The letter seemed to have been a cut-and-paste job from some previous matter in which SALC and its attorneys had been involved.
43. My attorney sent a response on 1 April 2019. A copy of this letter is annexed and marked “APMK2”.
44. SALC did not reply to the letter from my attorney and did not bring an application to be admitted as an *amicus*.
45. SALC evidently conceded that it did not have any grounds to be admitted as an *amicus*.
46. The request, however, is relevant to the question of SALC’s motives in this matter. This topic is addressed below.



47. The habeas corpus application was eventually heard on 5 and 6 August 2019.
48. The High Court (*per* Cloete J, Fortuin J concurring) dismissed the application on 19 September 2019.
49. I delivered an application for leave to appeal the following day, 20 September 2019. This application was argued on 30 October 2019 and was dismissed on 15 November 2019. On 17 December 2019, I lodged an application for leave to appeal to the Supreme Court of Appeal. At the time of deposing to this affidavit, the respondents in the habeas corpus application have not filed any opposing papers in the application to the Supreme Court of Appeal (they are only due in February 2020).
50. The day after the habeas corpus judgment was handed down, 20 September 2019, I was due to appear in the magistrates' court in the extradition enquiry on a so-called "provisional date". At this appearance my counsel submitted to the magistrate that the extradition enquiry should not commence until the appeal against the habeas corpus judgment had been finalised, or at least until the application for leave to appeal had been determined. The State Prosecutor (Adv Burke) argued that the enquiry should commence irrespective of the application for leave to appeal.

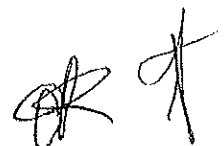


51. The magistrate decided that the commencement of the enquiry should not be delayed.
52. The parties and the magistrate then agreed that the enquiry would be set down on 29 November and 2 December 2019.
53. When the extradition enquiry commenced on 29 December 2019 Adv Burke sought to rely upon certain documents which are inadmissible. My counsel objected to the admission of these documents and argument in this regard was heard. On 2 December 2019 the magistrate reserved judgment on the admissibility of the documents, and she postponed the enquiry to 16 and 20 January 2020.
54. On 14 January 2020 the magistrate released her judgment on the question of admissibility, finding in my favour in relation to six of the documents against which the objection had been made.
55. The extradition enquiry is now due to recommence on 20 January 2020.

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I am not a Fugitive from Justice

56. SALC repeatedly states that I am a “fugitive from justice”. It does so without properly considering what is meant by the term “fugitive from justice”, and without having regard to the facts.
57. A fugitive from justice is someone who is wilfully avoiding the execution of the processes of the Court of the land or is avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the Court (see *Escom v Rademeyer* 1985 (2) SA 654 (T) at 658).
58. For a court to hold that I am a fugitive from justice, it would have to be shown that I left the Netherlands with the intention to flee and deliberately put myself beyond the jurisdiction of the court to avoid any legal action that might be brought up against me. This is not the case.
59. During the Dutch criminal proceedings I was permitted by the Dutch authorities to travel abroad.
60. At the time that I was convicted by the Den Bosch Court of Appeal, I was lawfully residing in South Africa. It was only my ill-health and fragile state which had prevented me from returning to the Netherlands of my own account.



61. My presence in South Africa was with the full knowledge and consent of the Dutch authorities and was not part of an attempt to avoid justice in the Netherlands.
62. Upon my conviction I immediately reached out to the South African authorities to inform them of my presence and my intention to cooperate.
63. Since then I have complied faithfully with all the South African legal processes and have not fled the country (despite having opportunities to do so), nor have I hidden within the jurisdiction of South Africa.
64. Far from seeking to avoid the extradition process and put myself beyond the reach of the law, I have willingly subjected myself to the extradition process.
65. Although my appeal to the Dutch Supreme Court was dismissed, there are grounds for an appeal to the European Court of Human Rights as a result of the irregularities in the proceedings before the Den Bosch Court of Appeal, and I have lodged such an appeal.
66. I have never fled from any court, nor have I failed to appear before any proceedings without due cause.
67. I am not a fugitive from justice.

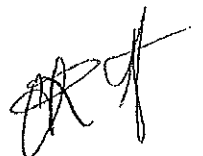
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68. Against that background I turn to elaborate on the four separate and self-standing grounds for opposing SALC's application.

GROUNDS OF OPPOSITION

Ground 1: SALC Lacks Standing

69. SALC failed to annex its constitution to the founding affidavit. SALC is called upon to disclose its constitution in reply, and I reserve my rights to deal with the constitution in a further affidavit.
70. Although I have not had sight of SALC's constitution, SALC's apparent constitutional objectives may be discerned from certain documents to which I do have access.
71. For instance, in the letter dated 29 March 2019 from SALC's attorneys to my attorney ("APMK1") it was stated that SALC's mandate is to promote human rights and protect the rule of law, and its constitutional objectives are three-fold:
- 71.1. To offer rapid response support relating to human rights, constitutional and public interest cases;



71.2. To support and act as a catalyst to lawyers on prospective cases for timeous preparation and resolution of cases; and

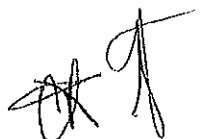
71.3. To promote awareness of human rights litigation frontiers, capacity building and to stimulate advocacy for law reform, human rights and constitutionalism (emphasis added).

(The contents of this letter are dealt with in more detail when I address the issue of a disguised extradition.)

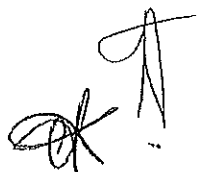
72. According to SALC's Biennial Report for the period 2015-2017 (being the most recent report published on its website), its vision is to work with local lawyers who are litigants in public interest cases. A copy of the relevant page of this report is annexed and marked "APMK3".

73. SALC's constitutional function is to support local lawyers. Its function is *not* to act as a litigant.

74. Furthermore, SALC claims to have an interest in promoting human rights and protecting the rule of law. Yet, it has not alleged that the impugned decisions have infringed any human right, or indeed any right contained within the South African Bill of Rights. Nor does the application serve to protect the rule of law. To the contrary, it undermines the rule of law.



75. SALC does not have any direct and personal interest in the relief sought. Nor does the application implicate any of the rights in the Bill of Rights.
76. On this basis alone SALC lacks standing, and the application should be dismissed.
77. SALC also asserts that the application is brought in the public interest. But SALC is not genuinely acting in the public interest.
78. The ongoing extradition proceedings constitutes a reasonable and effective manner by which the South African and Dutch governments seek to ensure my return to the Netherlands to serve the jail sentence. Insofar as there is any public interest in my being incarcerated in the Netherlands (which is denied), this interest is adequately advanced by the extradition proceedings.
79. There is no need for separate deportation proceedings.
80. SALC is evidently abusing these proceedings to make political statements and to promote itself.
81. The application was issued on Friday, 11 October 2019. On Monday, 14 October 2019 at 11h08 SALC issued a press release, a copy of which is annexed and



marked "APMK4". Most South Africa media outlets published a story regarding the application on the same day.

82. But the application was only served on my attorneys on 15 October 2019.
83. The press release was issued before the application was even served on my attorneys. This is not only unethical but placed me and my legal representatives in an invidious position. My attorney was asked by journalists to comment on a significant and highly prejudicial application, which had not even been served on me or him.
84. The haste with which the press release was issued shows that SALC is more concerned with political commentary and self-promotion than treating me fairly.
85. Furthermore, the press release makes several pejorative statements about which SALC has no personal knowledge, and which are false.
86. For instance, for the reasons given above, I am not a "*fugitive from justice*".
87. The press release also suggested that I am "*free and at large*". But I was incarcerated in December 2017 and have been subject to onerous bail conditions since my release. I have also been under court order to return to the magistrates'



court periodically. I have conscientiously complied with these requirements. I am therefore not “free” or “at large”.

88. The press release also stated that I lead an “*extravagant care free life*”. On what basis could SALC possibly have any knowledge of whether my life is “*extravagant*” or “*care free*”?
89. SALC is aware that I have serious medical complaints, and I am subject to extradition proceedings which, if successful, will remove me from my wife and young children, probably for the rest of my life. I have also been subject to strict bail conditions. My life is obviously far from “*care free*”.
90. SALC alleges further in the press release that I am responsible for thousands of deaths and atrocities. Even if the findings of the Den Bosch Court of Appeal were correct (which they are not), this allegation is an inaccurate exaggeration.
91. The press release alleges further that the extradition proceedings have been repeatedly postponed and delayed at the behest of and to the benefit of me. Again, SALC has no personal knowledge of the extradition proceedings.
92. The extradition proceedings were held up firstly by the length of time it took the Dutch authorities to submit a compliant request for a provisional arrest (4 May 2017 to 22 August 2017), then secondly by the dilatory prosecution of this request



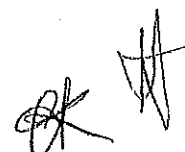
by the South African authorities (23 August 2017 to 8 December 2017) and thirdly by the tardy opposition to the habeas corpus application, including the delays in filing a proper record (1 February 2018 – 13 June 2018) and a complete set of answering affidavits (29 June 2018 – 9 November 2018).

93. All the delays in the habeas corpus application were caused by the respondents in that application. The postponement of the extradition enquiry while the habeas corpus application ran its course was ordered by the Cape Town magistrate. I cannot be blamed for the delays in the extradition proceedings.
94. SALC exhibited a reckless disregard for factual accuracy in its press release and published wild and spurious allegations, calculated to harm my reputation.
95. SALC's conduct shows that its motives are far from honourable.

Ground 2: A Disguised Extradition

Distinguishing extradition and deportation

96. In principle there is a clear distinction between extradition and deportation.
97. Deportation is usually a unilateral act while extradition is consensual. Different procedures are prescribed for deportation and extradition, and those differences



may be material in specific cases, particularly where the legality of the expulsion is challenged;

98. Deportation and extradition serve different purposes. Deportation is directed to the removal from a State of a foreigner who has no permission to be there. Extradition is the handing over by one State to another State of a person convicted or accused there of a crime, with the purpose of enabling the receiving State to deal with such person in accordance with the provisions of its law.
99. Deportation is a legal process by means of which a state rids itself of undesirable elements that have entered its territory. While extradition is destination-based, deportation is non-directive as regards destination.
100. Deportation is essentially a unilateral act of the deporting State in order to get rid of an undesired foreigner. The purpose of deportation is achieved when such foreigner leaves the deporting State's territory. The destination of the deportee is irrelevant to the purpose of deportation.
101. One of the important distinguishing features between extradition and deportation is therefore the purpose of the State delivery act in question.
102. If the (deportation) powers under the Immigration Act were to be used to surrender me to serve the jail sentence, that would be a misuse of such powers.

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103. In such an instance, the vehicle of deportation would be used with the prime motive of extradition.

104. As Lord Griffiths pointed out in *Bennett*:¹

“If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit.”

The motive for deporting me

105. The South African authorities seek to have me returned to the Netherlands to serve the jail sentence. But they seek to do so by way of an extradition. Even in these proceedings, Home Affairs does not support the deportation sought by SALC, choosing rather to abide.

106. As for SALC, its motive is plain. It wants me to be imprisoned in the Netherlands. SALC wants to have me surrendered to the Netherlands because that State has asked for me, and because I have been convicted of a jail sentence in that country.

¹ [1993] 3 All ER 138 (HL) at 150h.

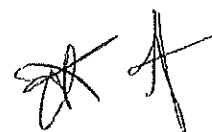
107. SALC has not made out a case that my presence in South Africa is not conducive to the public good or is otherwise undesirable.

108. Indeed, the nature of the offences of which I have been convicted are not such as to give rise to a risk of similar offences being perpetrated in South Africa. Even if I had been correctly convicted (which I deny), I would still not present a risk to the public good in this country. In the various bail proceedings, the State has never suggested that I would endanger the safety of the public or any particular person, or that I would commit an offence; or that I would undermine or jeopardise the objectives or the proper functioning of the criminal justice system; or that I would disturb the public order and undermine the public peace or security.

109. If I had not been sentenced to a period of imprisonment, SALC would not have brought this application.

110. SALC's motive is clear and unequivocal:

110.1. SALC initially sought to be admitted as an *amicus* in the habeas corpus application.

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110.2. When SALC requested the consent of the parties to be admitted as an *amicus*, it recorded that it intended to make legal submissions regarding the following “issues” –

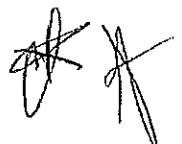
110.2.1. the supposed international law obligation of South Africa to extradite me based on the European Convention on Extradition; and

110.2.2. South Africa’s alleged obligation under customary international law to extradite me based on the principle *aut dedere aut judicare*.

110.3. In its press release of 14 October 2019, SALC stated that it had filed this application “... *to ensure that (I) should commence serving the 19 year sentence handed down to (me) in the Netherlands*” (see annexure “APMK4”).

110.4. In the founding affidavit SALC alleges that it: “*brings this application in its own interests, as an organisation dedicated to the upholding and protection of a country’s obligations to international commitments including those arising from customary international law” (para 18, emphasis added).*


- 110.5. SALC seeks an order that I be deported to a specific place, namely the Netherlands (notice of motion, para 5).
111. SALC has always been motivated by the desire to ensure my extradition. This was the rationale for its misconceived attempt to be admitted as an *amicus* in the habeas corpus application.
112. The reference in the press release to my jail term shows that SALC is concerned with my incarceration in the Netherlands, rather than ridding South Africa of undesirable elements.
113. Similarly, the allegation in the founding affidavit regarding international commitments and international law can only be a reference to my extradition (rather than deportation).
114. Finally, if SALC was genuinely motivated to deport me, it would not have specified a destination in the notice of motion.
115. SALC seeks to compel Home Affairs to use the powers under the Immigration Act to have me surrendered to serve the jail sentence. The vehicle of deportation is used with the prime motive of extradition.



116. But to deport me now would be to deny me the defences and remedies to which I am entitled under the Extradition Act.
117. The relief sought would constitute a disguised extradition and for this reason alone should be dismissed.
118. If this Court does find that the second respondent must take steps to deport me (which is denied), then I submit that the second respondent should not be compelled to deport me to the Netherlands. Rather, the destination should be of my choosing.

Ground 3: The Bail Orders

119. Bail was granted to me in terms of s 9(2) of the Extradition Act pending the finalisation of the extradition request from the Netherlands.
120. The original bail conditions were set by the honourable Magistrate Mr V Mhlanga, on 19 December 2017. A copy of his order is annexed hereto, marked "APMK5" (the order is mistakenly dated 19 November 2017). Paragraphs 4-6 are pertinent:



“4. The applicant should refrain from entering any port of entry (harbour and the airports) of South Africa for duration of the extradition proceedings.


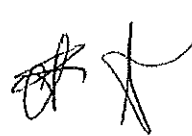
5. The applicant will not leave Cape Town or the Western Cape for the duration of his extradition proceedings.

6. The applicant’s passport will be kept by the investigating officer, warrant Officer Van der Heever for the duration of his extradition proceedings and he cannot apply for any travel document during this period from today until the extradition proceedings are concluded.”

121. These conditions were unnecessarily onerous. They required, for instance, that I report to the Sea Point police station every week day at two-hour intervals. A bail amendment application was brought in respect of the reporting conditions and on 4 January 2018 these conditions were ameliorated by Chief Magistrate Maku, who directed that I need only report to the Sea Point Police Station twice a day from Monday to Sunday. A copy of the Chief Magistrate’s order is annexed and marked “APMK6”.

122. A further application to amend the bail conditions was brought in April 2018. This application was necessitated by my medical condition at the time, having slipped and fallen at my home, shattering my left tibia. As a result of this accident I was physically unable to report to the police twice a day.



123. Pursuant to this application, on 25 May 2018, Magistrate Mhlanga revised the reporting condition and the provisions of my house arrest. In terms of this amended order I was obliged to report to the police three times a week (instead of twice a day). My week-end house arrest remained in place, although I was then permitted to leave the house for medical-related consultations and to attend church services. A copy of this order is annexed and marked "APMK7".
124. On 15 August 2018, Magistrate Arntsen ordered, by agreement, that my house arrest conditions be amended. Instead of being under house arrest for the whole week-end, I was now under house arrest every night from 21h00 to 07h00. A copy of the order is annexed hereto and marked "APMK8".
125. On 2 April 2019 I brought an application to amend the conditions relating to my house arrest. This application was opposed by the State and argued before Magistrate Mhlanga on 10 May 2019. On 17 May 2019 the magistrate ruled in my favour and revoked the condition that I be under house arrest. A copy of this order is annexed and marked "APMK9".
126. Finally, we have recently moved to [redacted] in order  that we may be closer to the school attended by our small children. As a result, and by agreement with the State, the bail conditions were amended to provide for my reporting at the Diep River police station. A copy of this order, dated 8 November 2019, is annexed and marked "APMK10".
- 

127. I have complied scrupulously with all the bail conditions over the last two years. I did so even when the bail conditions required that I report to the Sea Point police station seven times a day.
128. In addition to the bail conditions, I am subject to a court order directing me to appear in the magistrates' court for my next appearance in the extradition enquiry.
129. If the relief sought by SALC were to be granted, and there was compliance with such relief, the bail conditions and the court order directing my appearance would be breached.
130. The second respondent cannot be criticised for not taking action which would have been at odds with the orders of the magistrates' court. Similarly, this Court may not grant relief, compliance with which would result in the contravention of a different court order. To do so would be to undermine the rule of law.
131. On this basis alone, the application should be dismissed.

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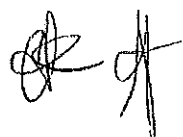
Ground 4: Procedural Protection

132. A decision to deport someone often carries far-reaching consequences - it concerns that person's livelihood, security, freedom and, sometimes, his or her very survival. This is why immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights.

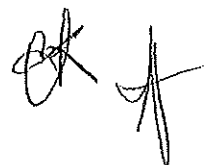
133. Sections 10(9) and (10) of the Immigration Act provide:

“(9) The Director-General may at any time in writing notify the holder of a visa issued in terms of this section that, subject to subsection (10), the visa shall be cancelled for the reasons disclosed in the notice and that the holder is thereby ordered to leave the Republic within a period stated in that notice, and upon the expiration of that period the visa shall become null and void.

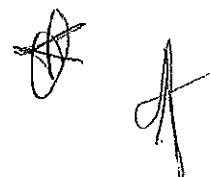
(10) The holder of a visa who receives a notice contemplated in subsection (9) may, before the expiration of the period stated in that notice, make representations to the Director-General which he or she shall consider before making his or her decision.”



134. The power of the second respondent under s 30 of the Immigration Act, to declare a foreigner undesirable, is discretionary.
135. Furthermore, according to section 30(2) of the Immigration Act: "*Upon application by the affected person, the Minister may, for good cause, waive any of the grounds of undesirability.*"
136. In seeking orders that I be deported without delay, SALC seeks to circumvent the protection afforded to me by the Immigration Act. In particular, the relief side-steps the discretion given to the second respondent and deprives me of the opportunity to make representations to the second respondent, which representations would have to be considered by the second respondent before making a decision to cancel my visa.
137. If I were to be afforded such an opportunity I would make representations relating *inter alia* to my personal circumstances including my poor health, the violation of my fair trial rights in the Netherlands, and the fact that there is an appeal pending before the European Court of Human Rights.
138. The orders sought by SALC also deny me the right to apply to the first respondent to waive the applicable ground of undesirability because, for instance, (a) my fair trial rights were violated, and (b) there is a pending appeal.



139. Were I to make the representations and/or application foreshadowed above to Home Affairs, their responses would be based on polycentric and policy-laden considerations. It is not for SALC, or this Court, to surmise how Home Affairs would respond to any representations or application which I may make.
140. Legislation has entrusted specific powers and functions to Home Affairs, and this Court should not usurp those powers or functions by making a decision of its preference. To do so would frustrate the balance of power implied in the doctrine of separation of powers.
141. In seeking to short-circuit the procedural protection afforded to persons by the Immigration Act, SALC seeks not only to deprive me of my rights, but also to violate the separation of powers.
142. For this reason as well, the application should be dismissed.
143. I now turn to respond to the specific allegations made in the founding affidavit insofar as it may be necessary. The responses below must be read together with what has been stated above. I do not respond to certain allegations which are irrelevant, and the absence of a response must not be construed as an admission.

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SERIATIM* RESPONSE TO FOUNDING AFFIDAVIT*Ad paragraphs 1-2**

144. I have no knowledge of the allegations made in these paragraphs, but they are accepted for the purposes of this application.

Ad paragraph 3

145. I deny that all the allegations in the founding affidavit are true and correct.

146. Several allegations are hearsay and have not been confirmed by someone with personal knowledge. Such allegations fall to be struck out and ignored.

Ad paragraph 4.1

147. For the reasons given above, I am not a fugitive from justice.

148. I am entitled to allow the extradition process, and the appeals, to run their course, rather than voluntarily returning to the Netherlands.

149. The failure to return to the Netherlands does not make me a fugitive from justice.

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Ad paragraph 4.2

150. Act 27 of 2002 (“the **Implementation Act**”) only commenced on 16 August 2002.

151. Section 5(2) of the Implementation Act states: “*No prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute.*”

152. I deny that I committed any war crimes either before or after 16 August 2002.

Ad paragraph 6

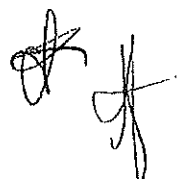
153. I deny that SALC brings this application in its own interest as well as in the public interest.

Ad paragraphs 7-8

154. I admit the allegations made in these paragraphs.

Ad paragraph 9

155. I no longer reside at 50 De Wet Road, Bantry Bay.

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Ad paragraph 10

156. I admit that extradition proceedings are pending. This fact is fatal to the application.

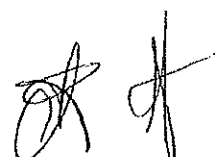
Ad paragraphs 11-16

157. I have no knowledge of the allegations made in these paragraphs but refer to what is averred above regarding SALC's lack of standing.

Ad paragraph 17

158. I deny that South Africa signed and ratified the Rome Statute in 1998.

159. The Rome Statute was adopted and signed on 17 July 1998 by a majority of states attending the Rome Conference, including South Africa. South Africa ratified the Rome Statute on 27 November 2000. It was the obligation of state parties, which signed and ratified the Rome Statute, to domesticate the provisions of the statute into their national law to ensure that domestic law was compatible with the statute. This was accomplished when South Africa passed the Implementation Act.



160. Save for the foregoing, I do not dispute the allegations made in this paragraph.

Ad paragraph 18

161. I deny the allegations made in this paragraph.

Ad paragraph 19

162. In this section of the founding affidavit SALC relies on allegations made in affidavits in the habeas corpus application.

163. Just because an allegation is a matter of public record, does not make it true. Nor does it make such allegation admissible in separate proceedings.

164. I only admit the allegations made in this section of the founding affidavit insofar as I made them, or admitted them, in the habeas corpus application.

165. In as much as the allegations relied upon are not admitted, they fall to be struck out and ignored as inadmissible hearsay.

Ad paragraph 20

166. I admit the allegations made in this paragraph.

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Ad paragraph 21

167. I admit the allegations made in this paragraph.

Ad paragraph 22

168. I admit the description of s 30(1) of the Immigration Act.

169. SALC omitted subsection (2), which is important to this application, and provides: "*Upon application by the affected person, the Minister may, for good cause, waive any of the grounds of undesirability.*"

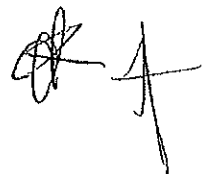
Ad paragraph 23

170. I admit the allegations made in this paragraph.

171. The relief sought by SALC would deprive me of my rights under s 10(10) of the Immigration Act.

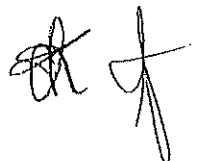
Ad paragraphs 24-29

172. I admit the allegations made in these paragraphs.

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Ad paragraph 30

173. I was not present when I was convicted. That is what I meant by having been convicted *in absentia*.
174. The South African authorities (the Department of Justice and SAPS, Interpol) were fully aware of the charges and the sentence.
175. I cannot comment on what the second respondent did or did not do. To the extent that this Court is inclined to hold the second respondent to a high standard of what he should or should not have done in the circumstances of my application, this Court will be loathe to set aside a grant of permit bearing in mind the obvious consequences for such a setting aside, having regard to the ongoing extradition enquiry which requires me to be present in South Africa.
176. As regards the alleged conviction in 1977 in the United States of America, there was no such conviction.
177. At the bail hearing my counsel addressed this allegation by Mr Jackson and explained that someone who owed me money was going to sell paintings to repay me, and that person was imprisoned in America.



178. My counsel pointed out that since 1977 I have travelled to America without any difficulties.

Ad paragraph 31

179. I admit that the second respondent issued me with a visitor's visa in terms of s 11(6) of the Immigration Act on 30 August 2017.

Ad paragraphs 32-33

180. I admit the allegations made in this paragraph. I point out that the Den Bosch Court of Appeal gave me permission not to attend the proceedings due to my ill health.

Ad paragraph 34

181. I admit the summary given in this paragraph only insofar as it is consistent with the judgment of the Den Bosch Court of Appeal.

Ad paragraph 35

182. I admit only that the Den Bosch Court of Appeal stated what is recorded in this paragraph.



183. I deny that this court's findings regarding my culpability are correct.

Ad paragraph 36

184. I admit the facts stated in this paragraph but deny the conclusion that I am a fugitive from justice.

Ad paragraph 37

185. I admit the allegations made in this paragraph.

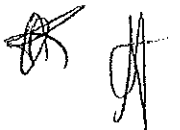
Ad paragraph 38

186. I admit the allegations made in this paragraph only insofar as they are consistent with what is averred above.

187. Judgment in the habeas corpus application has been handed down (although it is subject to an appeal), and the extradition enquiry is proceeding.

Ad paragraph 40

188. I maintain that my application for a s 11(6) visa was accurate.

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188.1. I correctly described the Dutch proceedings as a "conviction", rather than "pending".

188.2. I was not required to give further particulars of my conviction.

188.3. The form did not require me to advise whether a red notice had been issued. In any event, the relevant South African authorities were aware that a red notice had been issued.

188.4. I listed the ailments which prevented me from leaving South Africa, constituting the reasons why he couldn't return??

189. In my application my attorney specifically invited the second respondent to contact him if he required further information / documentation. The second respondent chose not to do so.

Ad paragraph 41

190. Mr Jackson did not state that I fell within the ambit of s 29 of the Immigration Act. The relevant paragraph in the affidavit is incomplete and nonsensical.

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Ad paragraph 42

191. I admit the allegation made in this paragraph.

Ad paragraphs 43-44

192. I have no knowledge of the allegations made in these paragraphs, but for the purposes of this application they are not disputed.

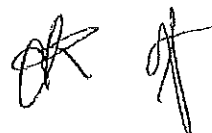
Ad paragraph 45

193. I admit that I presently reside in South Africa.

Ad paragraph 46

194. I deny the allegations made in this paragraph.

195. SALC is not "compelled" to launch this application. There are pending extradition proceedings which, if successful, will result in me returning to the Netherlands to serve the jail sentence (subject to the outcome of the appeal to the European Court of Human Rights).



Ad paragraph 48

196. The second respondent acted lawfully in not declaring me to be undesirable.

Ad paragraph 50

197. I deny the allegations made in this paragraph.

Ad paragraph 51

198. I deny that South Africa has acted in conflict with its international obligations.

199. South Africa is complying with its obligations insofar as it seeks my extradition.

200. If a state were obliged to deport everyone who met the requirements of s 30(1)(g) of the Immigration Act, that would leave very few person to be extradited under the Extradition Act for being convicted of an offence in a foreign country (see s 3 of the Extradition Act).

201. SALC loses sight of the fact that s 30 of the Immigration Act only states that foreigners may be declared undesirable. One of the grounds upon which the second respondent would properly exercise his or her discretion not to make such



a declaration, is where the person in question is already subject to extradition proceedings.

Ad paragraph 52

202. I deny that the second respondent had a duty to declare me undesirable.

Ad paragraph 54

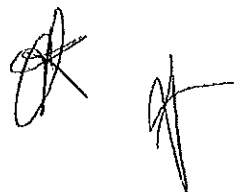
203. I deny the allegations made in this paragraph.

Ad paragraph 55

204. I do not know what knowledge the second respondent had regarding my conviction, although I admit that he did not make enquiries of me in this regard.

Ad paragraph 56

205. I deny the allegations made in this paragraph.

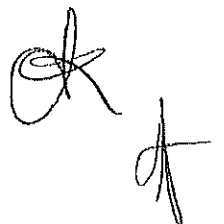
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Ad paragraphs 57-58

206. Section 29(b) of the Immigration Act refers to a conviction in respect of “*genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping*”.
207. I have not been convicted of any such crimes. To the contrary, the Den Bosch Court of Appeal found that there was no or insufficient proof that I had personally committed or incited actual war crimes (pg 81 of the translated judgment).
208. I am not a “*prohibited person*”.
209. The issuing of a visa to me did not contravene s 29(b) of the Immigration Act, was not irrational, and was not so unreasonable that no reasonable person would have exercised the power in this manner.

Ad paragraph 59

210. Save to observe that in terms of s 29(2) of the Immigration Act the second respondent may, for good cause, declare a person referred to in s 29(1) not to be a prohibited person, I admit the allegations made in this paragraph.

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211. Regulations 26(6) and (7) of the Immigration Regulations state:

“(6) The Director-General shall, in declaring a person not to be a prohibited person, consider the following factors:

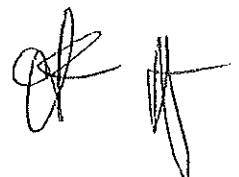
- (a) the reasons for the prohibition;*
- (b) the seriousness of the offence committed; and*
- (c) representations made by the prohibited person, which should include a police clearance certificate.*

(7) The Director-General shall, upon making a decision as contemplated in section 29(2) of the Act, provide written reasons for such decision.”

212. The relief sought in this application emasculates s 29(2) of the Immigration Act, as well as the right to written reasons under regulation 26(7). Furthermore, the factors set out regulation 26(6) show that the question of whether a person should be declared not to be prohibited, is of the kind appropriately considered by the second respondent, rather than a court.

Ad paragraphs 60-61

213. I do not dispute the submissions made in these paragraphs.



Ad paragraph 62

214. I do not agree with the submissions made in this paragraph. Having regard to the ongoing extradition proceedings, the second respondent acted properly in not making any declaration of undesirability.

Ad paragraph 63

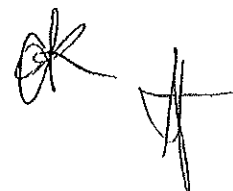
215. SALC has not made out a case for the relief sought in the notice of motion.

216. In any event, even if the impugned decisions are reviewable (which is denied), having regard to the ongoing extradition proceedings, this Court should not set aside the decisions, nor should the second respondent be directed to take steps to deport me.

Ad paragraphs 64-70

217. This is not an exceptional case which warrants the Court making a decision for the second respondent.

218. Whether or not I should be declared undesirable is a policy-laden and polycentric decision. This Court is not in as good a position as the second respondent to make the decision.

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219. In particular, this Court is not equipped to balance the various considerations which are relevant to the exercise of the discretion under s 30(1) of the Immigration Act. This Court does not have experience in exercising such a discretion and cannot be certain that all the relevant information is before it.
220. This is also not a case where the result of the decision is a foregone conclusion. The second respondent would have to weigh up various factors, including my personal circumstances, the state of the extradition proceedings and the infringements of my fair trial rights in the Dutch proceedings. There is, at the very least, a plausible argument that I should not be declared undesirable, or that the applicable grounds of undesirability should be waived.
221. There is also no urgency, and no prejudice will arise if the decision is remitted to the second respondent.
222. In addition, if the Court were to make this decision for the second respondent, it would undermine my right to seek a waiver for good cause under s 30(2) of the Immigration Act.
223. If this Court finds that the decision to issue me a visa should be set aside (which is denied), the appropriate relief is to remit the decision to the second respondent.

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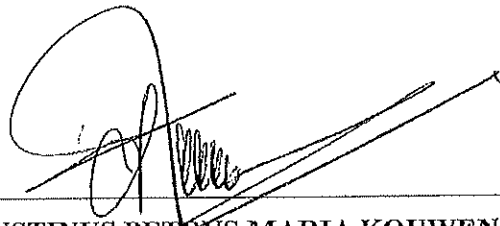
Ad paragraphs 72-78

224. I do not oppose the late filing of the application.

225. The delay in launching the application does show that there is no urgency in the relief sought by SALC.

CONCLUSION

226. I ask that this Court dismiss the application with costs, including the costs of two counsel to be paid by SALC.



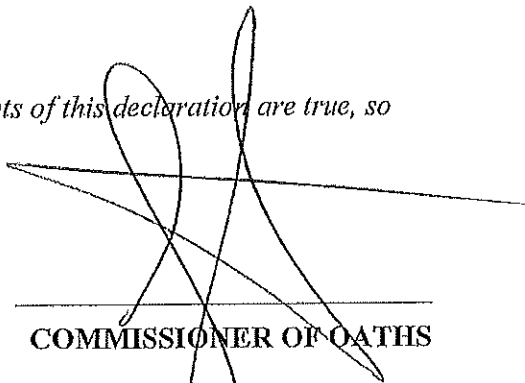
AUGUSTINUS PETRUS MARIA KOUWENHOVEN

I certify that:

On 16 January 2020 the deponent signed this affidavit and swore and acknowledged that he:

- a) Knew and understood the contents thereof;
- b) Had no objection to taking the oath; and
- c) Considered the oath to be binding on his/her conscience.

The deponent then uttered the words "*I swear that the contents of this declaration are true, so help me God*".



COMMISSIONER OF OATHS

**JACQUELINE HUDSON
COMMISSIONER OF OATHS
PRACTISING ATTORNEY RSA
10th FLOOR, TOUCHSTONE HOUSE
7 BREE STREET, CAPE TOWN**

Full names:

Designation and area:

Street address: